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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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REUBEN DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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19 pp

QUESTION PRESENTED

In a federal criminal trial does either the due process or double jeopardy clause of the Fifth Amendment bar the introduction of evidence concerning prior unrelated criminal conduct for which a defendant has been previously tried and acquitted, and, if so, did the Court of Appeals erroneously utilize the statutory harmless error standard rather than the more stringent standard required by Chapman v. California, 386 U.S. 18 (1987), after determining that such evidence had been erroneously admitted.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Reuben Dowling petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

PARTIES TO THE PROCEEDING

The caption of the case provides the names of all parties to the proceeding.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 855 F.2d 114 (3d Cir. 1988), and appears herein as Appendix A. The order of the Third Circuit denying petitioner's Petition to Rehear and Suggestion for Rehearing En Banc appears herein as Appendix B.

JURISDICTION

The opinion of the Third Circuit was filed on August 22, 1988. The order denying the Petition to Rehear and Suggestion for Rehearing En Banc was filed on September 28, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the Fifth Amendment to the United States Constitution provides in relevant part that:

> [No person shall] be deprived of life, liberty, or property, without due process of law;

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

18 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52(a), Federal Rules of Criminal Procedure, provides:

> Rule 52. Harmless Error and Plain Error:
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

The petitioner was tried in the District Court of the Virgin Islands for bank robbery and related offenses, stemming from

the robbery of the First Pennsylvania Bank in Frederiksted, St. Croix, United States Virgin Islands on July 8, 1985. [1]

Petitioner's first trial ended in a hung jury. At his second trial petitioner was convicted of various offenses relating to the bank robbery. This conviction was reversed by the United States Court of Appeals for the Third Circuit because of the extra-record information that was related by one of the jurors to others in the group. Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).

Petitioner's third trial again resulted in a conviction for various offenses. Petitioner was then sentenced to seventy years imprisonment. (App. C).

The evidence against against petitioner consisted of eyewitness and circumstantial evidence. At petitioner's third trial the Government was allowed to introduce evidence of one Veena Henry to the effect that approximately two weeks after the bank robbery the petitioner has allegedly broken into Ms. Henry's home and robbed her. The Government had not tried to introduce this evidence at either of petitioner's first two trials. The District Court admitted the evidence pursuant to Federal Rules of Evidence 404(b) to establish identify. The petitioner interposed a timely objection arguing that the evidence should not be admitted because

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1The bank robbery counts were federal statutory violations (18 U.S.C. Sections 2113(a) and 2113(d), and were charged by a separate Information. The other charges were Virgin Islands violations (14 V.I.C. Section 1862(2); 14 V.I.C. Section 297(2); 14 V.I.C. Section 2253(a); 14 V.I.C. Section 2254; 14 V.I.C. Section 1083(1) and 14 V.I.C. Section 1392). The District Court for the Virgin Islands had jurisdiction pursuant to 48 U.S.C. 1612.

the defendant had been previously tried for the robbery for Ms. Henry and acquitted.

On appeal the petitioner again argued that the admission of this evidence was error entitling him to a new trial. The Third Circuit agreed with petitioner that the evidence was erroneously admitted. As discussed in more detail below, the basis of the Third Circuit's holding was not clear. The Court cited its own prior decision in United States v. Keller, 624 F.2d 1154 (3d Cir. 1980) where it had left open the constitutional issue presented by the admission of prior acquittal evidence and the Fifth Circuit's opinion in Wingate v. Wainright, 464 F.2d 209 (5th Cir. 1972), which had expressly precluded the use of such evidence on constitutional grounds.[2]

The court then considered the issue as to whether the admission of such evidence was harmless error. Stating that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right, the court then applied its "high probability" standard of harmless error review. 855 F.2d at 123. This standard required that the court have a "sure conviction that the error did not prejudice the defendant but need not disprove every reasonable possibility of prejudice." Id. The court then proceeded to review the evidence and, while not "entirely discount[ing]" the prejudice

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2The court also held alternatively that the district court abused its discretion in admitting the evidence pursuant to Rule 404(b), as the prejudicial value outweighed its limited probative value.

to petitioner by the admission of the prior acquittal evidence, ruled that the high probability standard had been met and that a new trial was not required. Id. at 124.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question that frequently occurs in criminal trials where when the Government attempts to introduce evidence under Rule 404(b), Federal Rules of Evidence,[3] concerning prior unrelated criminal conduct for which the defendant has previously been tried and acquitted. The majority of the circuits exclude such evidence. United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979); United States v. Keller, 624 F.2d 1154 (3d Cir. 1980); Wingate v. Wainright, 464 F.2d 209 (5th Cir. 1972); United States v. Day, 591 F.2d 861 (D.C. Cir. 1979); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984). Other circuits have held that the prior acquittal does not bar introduction of evidence concerning prior criminal conduct if such evidence would otherwise be admissible under Federal Rules of Evidence 404(b). United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979); United State v. Rocha, 553 F.2d 615 (10th Cir. 1977). Other Circuits approach the issue on a case-by-case basis focusing on the nature of the issue decided in the first trial and its relationship to the case under consideration. United States v.

3Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Johnson, 697 F.2d 735 (6th Cir. 1983).

The Circuits excluding such evidence have been unable to agree on the bases for their decision, variously citing either due process concerns, double jeopardy protection, or common law collateral estoppel principles as prohibiting the introduction of such evidence. Compare United States v. Mespoulede, supra, and Wingate v. Wainright, supra, with United States v. Keller, supra.

Although the Third Circuit agreed with petitioner that the evidence concerning the prior robbery for which the petitioner had been acquitted was erroneously admitted the court did not clearly state the basis for its conclusion. If such evidence is precluded by virtue of the due process or double jeopardy clause of the Fifth Amendment then this Court's decision in Chapman v. California, supra, would require the conviction be reversed unless it could be determined beyond a reasonable doubt that the admission of such evidence was harmless. See Albert v. Montgomery, supra. On the other hand if such evidence is merely barred on other than constitutional grounds, then the Third Circuit correctly applied the less stringent statutory harmless error standard.

In holding that the admission of the evidence was error the Third Circuit cited its own decision in Keller, supra, and the Fifth Circuit's decision in Wingate, supra. 855 F.2d 120-122. Wingate held the admission of the evidence concerning criminal conduct for which a defendant had been acquitted was "fundamentally unfair" and a violation of both due process and double jeopardy. 624 F.2d at 1160. Keller, on the other hand, while recognizing that this Court's opinion in Ashe v. Swenson, 397 U.S. 436 (1970)

might be read to incorporate collateral estoppel principles within the ambit of the double jeopardy clause even where multiple prosecution issues were not raised, nonetheless avoided the constitutional issue and held that common law principles of collateral estoppel barred evidence concerning crimes for which a defendant had been acquitted.

After holding the evidence inadmissible, the Third Circuit engaged in a lengthy harmless error analysis in this case. However, without any extended discussion, the Court simply stated that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right. 855 F.2d at 122. In so ruling, the Court made no reference to the question it left open in Keller concerning the relationship between collateral estoppel and double jeopardy in situations where the Government attempts to introduce prior acquittal evidence. The Court also failed to discuss the significance of its express approval of the Fifth Circuit's holding in Wingate excluding such evidence on constitutional grounds and its adoption of the Wingate language that such evidence was "fundamentally unfair and totally incongruous with our basic concept of justice." 855 F.2d at 121.

In refusing to apply the Chapman standard, the approach of the Third Circuit conflicts with that taken by the Second, Fifth and Eleventh Circuits which have found the admission of such prior acquittal evidence to be a violation of due process and/or double jeopardy. In Albert v. Montgomery, supra, the Eleventh Circuit specifically held that this Court's decision in Chapman provided the proper standard for analysis of the issue as to whether the

admission of such evidence was harmless error. The Second Circuit in United States v. Mespoulede, supra, and the Fifth Circuit in Wingate v. Wainright, supra, ordered new trials without engaging in any harmless error analysis at all.

This case is worthy of the Court's consideration for several reasons. First, this case presents an important question that occurs not infrequently in criminal trials and one which implicates fundamental concerns on behalf of both the Government and the defendant. The Government has a strong interest in being allowed to introduce evidence that bears upon relevant issues such as the defendant's identity, intent, motive, etc. See Federal Rules of Evidence 404(b). However, against this the courts must weigh the strong interest of a defendant against having to repeatedly defend against factual allegations which have previously been determined in his favor. See United States v. Mespoulede, supra; Albert v. Montgomery, supra.

Second, this Court should decide this issue because the Courts of Appeal are in considerable conflict not only on issue of the admissibility of such evidence, but also where there is agreement that such evidence is not to be admitted, there is disagreement as to the theoretical approach taken.

The Second, Fifth and Eleventh Circuits follow the rule that prior acquittal evidence is constitutionally barred by virtue of fundamental fairness required by the due process clause and/or collateral estoppel principles embodied in double jeopardy as announced in this Court's decision in Ashe v. Swenson, supra. See United States v. Mespoulede, supra; Wintgate v. Wainright, supra;

Albert v. Montgomery, supra. Other courts have explicitly rejected the double jeopardy and constitutional argument, but applied common law collateral estoppel principles to bar the introduction of such evidence if the record shows that the first jury must have decided the factual issue in favor of the defendant. United States v. Johnson, 697 F.2d 735 (6th Cir. 1983). The Third Circuit in United States v. Keller, supra, and in this case, seems to follow a different approach, holding that common law collateral estoppel principles bar the introduction of such prior acquittal evidence without regard to a specific determination as to whether the prior factual issue had conclusively been decided in the defendant's favor. Still other courts have barred the use of such evidence by citing collateral estoppel principles without reference to the constitutional issues raised by Ashe. See United States v. Day, 591 F.2d 861 (D.C. Circuit 1979). The Seventh Circuit has taken the approach that the admissibility of such evidence should be determined by the normal process of balancing the probative value of such evidence against the prejudicial value with a specific emphasis being placed on the fact that the probative value is lessened by the acquittal. See United States v. Phillips, 401 F.2d 301 (7th Cir. 1968). Finally, the Ninth and Tenth Circuits seem to hold that the fact of the prior acquittal is not determative where the evidence otherwise meets the standards of Federal Rules of Evidence 404(b). United States v. Rocha, supra; United States v. Van Cleave, supra. This case dramatically illustrates the different results obtained depending on the analysis utilized by the court.

Third, the Court should grant the writ to provide further clarification of the reach of this Court's opinion in Ashe v. Swenson, supra. The conflicts in the Courts of Appeal result from different interpretations of the applicability of the principles of Ashe to the attempted introduction of prior acquittal evidence in a subsequent prosecution that does not arise from the same conduct. The Second Circuit's decision in United States v. Mespoulede, supra, the Fifth Circuit's decision in Wingate v. Wainright, supra, and the Eleventh Circuit's decision in Albert v. Montgomery, supra, interpret Ashe as constitutionally prohibiting the use of prior acquittal evidence in such situations. Other circuits seem to read Ashe as only prohibiting multiple prosecutions based on the same factual scenario already determined in a defendant's favor and do not apply Ashe as a total bar of prior acquittal evidence. This precise question was left open by the Third Circuit in Keller, the principal authority relied upon in this case.

Since Ashe this Court has determined that an acquittal in a criminal case does not collaterally estop the same issue from being litigated in a civil case, One Lot Stones v. United States, 409 U.S. 232 (1972), that the principles of Ashe do not prohibit a defendant from being convicted of aiding and abetting even though the principle has been acquitted, Standefer v. United States, 447 U.S. 10 (1980), that a plaintiff in a Section 1983 action based on alleged violation of the Fourth Amendment is collaterally estopped from relitigating the issue after it had been adversely decided against him in a state court criminal proceeding, Allen v. McCurry, 449 U.S. 90 (1980), and that an acquittal does not bar subsequent

forfeiture proceedings based on the same conduct, United States v. One Assortment of Eighty-Nine Firearms, 465 U.S. 354 (1984). However, this Court has not addressed the important issue presented here which was left unanswered in Ashe and which has produced a great deal of conflict and disagreement in the Circuits.

Finally, this case presents a particularly appropriate vehicle for deciding these questions as the issue presented here is narrowly drawn and petitioner's argument is specifically tailored to the facts of this case. While specifically relying on its prior decision in Keller, where the constitutional issue was left open, the Third Circuit nonetheless clearly stated it was not obligated to apply the harmless error analysis required for errors of constitutional dimension. Had the Court applied the more stringent standard it is not clear that the result would have been the same. A prior trial where the evidence had not been admitted had resulted in a hung jury. In its lengthy harmless error analysis the Court specifically stated that it could not "entirely discount the possibility that there may have been some prejudice" to petitioner by introduction of the evidence. 855 F.2d at 123. If the prior acquittal evidence was inadmissible by virtue of either the due process or double jeopardy clauses of the Fifth Amendment then petitioner is entitled to have the effect of that error determined pursuant to this Court's decision in Chapman v. California, supra.

CONCLUSION

For the foregoing reasons, the petitioner especially submits that this Court should grant its petition for a writ of certiorari to review the decision of the United States Court of

Appeals for the Third Circuit in this case.

Respectfully submitted.

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NOVEMBER 1988

CERTIFICATE OF SERVICE

I, Robert L. Tucker, an attorney admitted to practice before the United States District Court of the Virgin Islands, do hereby certify that I caused the original and nine (9) copies of the foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Third Circuit to be forwarded to the Honorable Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, and further certify that I cause two copies to be forwarded to the Solicitor General, Department of Justice, Washington, D.C. 20530; two copies to the United States Attorney's office, Hamilton House, Christiansted, St. Croix 00820; and one copy to petitioner, Reuben Dowling, this 28th day of November, 1988.

Robert L. Tucker

88-602

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STATEMENT OF COUNSEL

I, Robert L. Tucker, being first duly deposed and sworn, do hereby state the following:

I am a member of the Bar of this Court. On November 28, 1988, within the time specified for filing a petition for writ of certiorari in the above-styled case, said petition was deposited in the United States post office mail box, with first-class postage prepaid, addressed to the Clerk of this Court, and accompanied by a Certificate of Service to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and the United States Attorney for the District of the Virgin Islands.

Robert L. Tucker

SUBSCRIBED AND SWORN to before me this 28th day of November, 1988.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Robert L. Tucker, an attorney admitted to practice before the Supreme Court of the United States, do hereby certify that I have on this date forwarded first-class, postage prepaid, a copy of the foregoing Statement of Counsel to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to the United States Attorney's office, Hamilton House, Christiansted, St. Croix, 00820. November, 1988.

Robert L. Tucker